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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-228

TEXAS LANDOWNERS RIGHTS ASSOCIATION, *et al.*,

Petitioners,

v.

DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, Texas Landowners Rights Association, the State of Missouri, 40 local governments and several hundred landowners (individually and through their associations),[1] pray that a writ of certiorari issue to review the judgment (without opinion) of the United States Court of Appeals for the District of Columbia Circuit, entered May 15, 1979.

That judgment held that these landowners' claims of an unlawful taking of land by, and lack of procedural due

[1] Appendix C to this petition contains copies of the caption and amendments to the complaint, showing the parties below.

process attending, their inclusion under federally required flood plain zoning provisions, even though admitted by the respondent federal officials, do not merit relief.

OPINION AND JUDGMENT BELOW

The judgment of the Court of Appeals below (unreported)[2] is reproduced as Appendix A to this petition. That judgment affirmed the summary judgment of dismissal and memorandum opinion of the District Court, reported at 453 F. Supp. 1025 (D.D.C., May 31, 1978) and reproduced as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 15, 1979, and this petition for certiorari is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a hearing is required as a matter of right, rather than of administrative discretion, prior to the enforcement of federal adjudications of property as floodprone by withdrawal of loans from any federally regulated private lending institution.
2. Whether enforcement of a federal program by denial of loans by federally regulated private lending institutions is an exercise of the general welfare clause of the Constitution.

[2]The judgment of the Court of Appeals is noted in the table at 598 F.2d 310, 311.

3. Whether a federal exercise under the general welfare clause extinguishes, as a matter of law, any claim by a landowner of a "taking" of a particular parcel without procedural or substantive due process.
4. Whether a federal exercise under the general welfare clause precludes any judicial application of the federalism protections of state and local governments articulated in *National League of Cities v. Usery* and admitted in *EPA v. Brown*.
5. Whether state and local governments have waived the protections of constitutional federalism by agreeing to enforce federal land use law at their own expense and against their independent legislative judgment, where the governments' agreement is motivated not to secure federal benefits for themselves but to avoid federal financial penalties on their citizen landowners.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The National Flood Insurance Program is codified at 42 U.S.C. §4001 *et seq.* (1976 and Supp. 1, 1977). The specific sanctions of the Program challenged and upheld in the Courts below are these.

United States Code, Title 42:

§4106. *Nonparticipation in flood insurance program.*
(a) Prohibition against Federal approval of financial assistance.

No Federal officer or agency shall approve any financial assistance for acquisition or construction purposes on and after July 1, 1975, for use in any area that has been identified by the Secretary as an area having special flood hazards unless the community in which such

area is situated is then participating in the national flood insurance program.

(b) Notification of purchaser or lessee of property in flood hazard area of availability of Federal disaster relief assistance in the event of a flood disaster.

In addition to the requirements of section 4104a of this title, each Federal instrumentality described in such section shall by regulation require the institutions described in such section to notify (as a condition of making, increasing, extending, or renewing any loan secured by property described in such section) the purchaser or lessee of such property of whether, in the event of a disaster caused by flood to such property, Federal disaster relief assistance will be available to such property.

§ *4012a. Requirement of flood insurance for federal approval of financial asistance.*

(a) Amount and term of coverage.

After the expiration of sixty days following December 31, 1973, no Federal officer or agency shall approve any financial assistance for acquisition or construction purposes for use in any area that has been identified by the Secretary as an area having special flood hazards and in which the sale of flood insurance has been made available under the National Flood Insurance Act of 1968 [42 U.S.C. 4001 et seq.], unless the building or mobile home and any personal property to which such financial assistance relates is, during the anticipated economic or useful life of the project,

covered by flood insurance in an amount at least equal to its development or project cost (less estimated land cost) or to the maximum limit of coverage made available with respect to the particular type of property under the National Flood Insurance Act of 1968, whichever is less: *Provided,* That if the financial assistance provided is in the form of a loan or an insurance or guaranty of a loan, the amount of flood insurance required need not exceed the outstanding principal balance of the loan and need not be required beyond the term of the loan.

(b) Federal regulations for flood insurance requirement; amount of coverage.

Each Federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations, or similar institutions shall by regulation direct such institutions not to make, increase, extend, or renew after the expiration of sixty days following December 31, 1973, any loan secured by improved real estate or a mobile home located or to be located in an area that has been identified by the Secretary as an area having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act of 1968 [42 U.S.C. 4001 et seq.], unless the building or mobile home and any personal property securing such loan is covered for the term of the loan by flood insurance in an amount at least equal to the outstanding principal balance of the loan or to the maximum limit of coverage

made available with respect to the particular type of property under the Act, whichever is less.

(c) * * *

Constitution of the United States, Art. I, § 8, cl. 1:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the. . . general welfare of the United States. . .

Constitution of the United States, Art I, § 8, cl. 3:

The Congress shall have power . . . to regulate commerce. . .

Constitution of the United States, Art. I, § 8, cl. 5:

The Congress shall have power. . . to coin money, regulate the value thereof. . .

Constitution of the United States, Art. IV, § 4:

The United States shall guarantee to every State in this Union a republican form of government. . .

Constitution of the United States, Amendment V:

No person shall. . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

This case arises under a Federal program which requires that any property designated by the federal government to be floodprone must be covered by flood insurance. The federal government participates in the marketing of flood insurance by subsidizing temporarily the private insurance industry, and by providing sanctions to enforce the requirement of insurance coverage. A condition of the insurance coverage is the adoption and enforcement by local governments of federally drafted laws respecting building standards and zoning within federally adjudicated floodprone areas.

The gravamen of this case is that amendment in 1973 of the sanction provisions securing conformance to these requirements transformed a voluntary federal insurance program (established in 1968) into one coercing the participation both of landowners who neither need nor want the insurance, and of their state and local governments which neither need nor want to implement a federal zoning and building code.

Petitioners invoked the jurisdiction of the District Court below under 28 U.S.C. § 1331(a); that Court found the constitutional issues raised to be substantial.[3]

The complaint alleged that the properties of petitioner landowners had been adjudicated by the Federal Emergency Management Agency (FEMA) under the National Flood Insurance Program (Program)[4] to be flood hazard

[3] 453 F. Supp. at 1027, p. 4a *infra*.

[4] The functions of the Program, originally within the federal Department of Housing and Urban Development, have been transferred to the Federal Emergency Management Agency (FEMA). E.O. 12127 (Mar. 31, 1979), 44 Fed. Reg. 19367 (Apr. 3, 1979). After argument in the Court of Appeals, the Director of FEMA was substituted for the Secretary of Housing and Urban Development as appellee. Throughout this petition, administrative actions currently undertaken by FEMA are attributed to that agency, even though all administrative

(footnote continued)

areas, irrationally and without procedural due process.[5]

In consequence of those adjudications (as the District Court below summarized the Program),

> the community in which that property is located must participate in the Program to be eligible for federal assistance, and further, that property located in a participating community must be covered by flood insurance not only to be eligible for direct federal assistance, but also to receive mortgage money from a federally supervised private institution. *** Acceptance into the Program is, of course, contingent upon the community's adoption of local flood plain management efforts consistent with [FEMA] promulgated guidelines.[6]

The petitioner state and local governments challenged, as violative of the guarantees of constitutional federalism as restated by this Court,[7] the requirement that they "participate in the Program", against their will, and against their legislative judgment that FEMA's land use restrictions were not needed in some or all of the areas adjudicated as floodprone.

(footnote 4 continued)
actions in the record of this case were undertaken in the name of HUD prior to the creation of FEMA.

[5]Complaint ¶¶ 7, 11(a), 54-245, 270-278.

[6]453 F. Supp. at 1028, p. 7a *infra*.

[7]*National League of Cities v. Usery*, 426 U.S. 833 (1976); *EPA v. Brown*, 431 U.S. 99, 103 (1977), distinguished, 453 F. Supp. at 1029-1031, pp. 8a-12a, *infra*.

Federally Required Local Government Legislation and Enforcement of Federal Zoning Provisions.

For the petitioner state and local governments, participation in the Program requires the adoption as local law, and enforcement at local expense, of FEMA's form of zoning and building restrictions within an area for which FEMA has determined there is a 1% (once in 100 years) chance of any flooding.[8]

As set out in the regulations,[9] FEMA's requirements expand with the completion of the steps in FEMA's adjudication of property as hazardous. The requirements contemplate modifications of local building permit, zoning and subdivision laws. The requirements set standards for municipal water supply systems and sanitary sewage systems.[10] The regulations ultimately prohibit new or replacement construction within the floodway of the 1% hazard area, and require that any improvements within the entire 1% area be elevated or otherwise floodproofed.

Communities which undertake to enforce FEMA's form of zoning and building code[11] are not provided any federal funds to cover the cost of enforcement; nor are these communities indemnified against the cost of defense or the cost of judgment in landowner challenges to enforcement of erroneous designation under the 1% standard.

The record reflects costs such as these to petitioner state and local governments: $90,000 in annual enforcement costs to Prescott, Arizona;[12] $50,000 annually to

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[8]24 C.F.R. §1909.1 (definitions of "base flood", "flood elevation determination"); these regulations are authorized under 42 U.S.C. §§4121 and 4128.

[9]24 C.F.R. §§1909.22, 1910.3 to 1910.5.

[10]24 C.F.R. §1910.3(a)(5)-(6).

[11]Exhibit C to complaint.

[12]Complaint ¶ 157.

Carlsbad, New Mexico;[13] $111,000 annually to Lee County, Florida.[14] The record reflects threatened landowner suits for inverse condemnation against local governments enforcing FEMA's zoning and building code provisions.[15] Cape Girardeau, Missouri computed a loss in real property taxes of $12,000 annually from the diminished value of 2 city blocks designated by FEMA as floodprone.[16]

Federal Designation of Petitioners' Lands as Flood-Prone, Admitted to be Unlawful and Found to Constitute a Taking.

The object against which this federally required local legislation is enforced is property designated by a federal adjudicatory process to be floodprone.

FEMA constructs, for every community in the nation (whether or not participating in the Program), a map showing the 1% flood hazard line and other information. This process, under 24 C.F.R. §§ 1914.3, 1915-1920, has been described as follows:

> *Determination of Hazard Area Boundaries*
>
> Hazard areas are to be delineated by [FEMA] on maps provided to the community.*** Although [FEMA] is required ultimately to notify the community of boundaries for each of the hazard areas, the law provides that [FEMA] may notify a community that it is subject to the program and provide less than complete information concerning the hazard areas.***

[13]Complaint ¶90h.
[14]Complaint ¶137.
[15]Complaint ¶¶64, 90g, 156.
[16]Complaint ¶59.

> Upon notification by [FEMA], whatever the degree of specificity of notice, either individuals or the community, or both, may administratively appeal the [FEMA] determinations of special hazard areas or other data. Landowners or the community or both are given 90 days after notification by [FEMA] to effectuate the appeal by submitting technical data to negate or contradict the [FEMA] tentative findings. After exhausting the administrative remedies, an appeal may be taken to the federal district court within 60 days of the final administrative decision. In order to assist in the rapid implementation of the program, however, the [FEMA] determinations remain in force during the court appeal. The appeal procedures of the law supersede related provisions of the Administrative Procedure Act.[17]

There is no right to an administrative hearing in the Federal flood zone designation process. The statute[18] places the decision to hold a hearing solely within the discretion of the Administrator.[19] Implementing regulations provide:

> An administrative hearing under this Part shall only be held if a community appeals the Administrator's flood elevation determination established pursuant to § 1917.8 of this subchapter, or otherwise, and the Administrator has

[17]F. Bosselman, D. Feurer and T. Richter, *Federal Land Use Regulation* 96-97 (1977) (footnotes omitted). See also 24 C.F.R. §1917.12(c).

[18]42 U.S.C. §4104(e).

[19]The administrator has similarly plenary discretion to refuse approval of variances. 24 C.F.R. §1910.6.

> determined that such appeal cannot be resolved by consultation with officials of the community, or by submission of the conflicting data to an independent scientific body or appropriate Federal agency for advice.[20]

The administrator in fact does not apply many of his resources to the full airing of conflicting[21] data during these adjudications.

In February 1976, FEMA advised its field staff:

> "The Technical Services Division has advised me that the costs of [FEMA] funded county flood insurance studies are becoming far too high. The apparent reason is that too many areas are being studied by the detailed rather than the approximate method.
>
> Each of you know that our guidelines provide that we will study in detail only those areas which are developed or are expected to be developed over the next five years. More importantly, you should resist efforts to use the flood insurance study program as an overall comprehensive planning effort by communities. This is not the intent of the program nor can we bear this cost."[22]

The Federal flood zone determinations in Fort Bend County, Texas, were based upon inaccurate and obsolete data; scientific and technical information submitted by the County was rejected.[23] Landowners in San Diego, California, have been denied the right to a hearing and the opportunity to effectively present evidence rebutting inaccurate federal flood zone adjudications.[24] No hearing was held for the flood zone determinations of petitioners in Clute, Texas; Grand Island, Nebraska; Prescott, Arizona and others, even though these communities dispute the Federal determinations and have submitted scientific information to FEMA.[25]

The administrator is not required to create a record reflecting his evaluation of conflicting technical data submitted by local governments and landowners.[26]

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[20]24 C.F.R. §1918.3.

As described in 24 C.F.R. §1916, community consultation procedures afford no right to any type of hearing. They are no more than a method of distributing flood zone designation materials to each community and reminding each community of the community's duties under the Program. 24 C.F.R. §§1916.5, 1916.6. See 42 U.S.C. §4107.

[21]The prospect of accuracy in local application of the 1% hazard rule has been used in justification of the rough nature of the 1% rule itself. Since application of the 1% rule is a prediction based on past data and hydrologic considerations, its accuracy is substantially enhanced by a full airing of conflicting estimates.

Senator Johnson of the Banking, etc., Committee, summarized in his additional views:

> Several witnesses summarized the state of the art or science of flood level prediction as little more than educated guesses and less susceptible of scientific determination than predicting the weather.*** The problem with the 100 year flood level determination, is not imprecision alone, but also the economic ramifications of this imprecision. The cost of building up to the 100 year flood level is already predicted to be high, sometimes adding an additional 15-25 per cent to construction cost. It is one thing to require this additional cost of homebuilders if it is based on a correct elevation premise. It is quite another, I feel, to impose unwarranted costs predicated on errors of judgment caused by what is known to be lack of a well-developed body of scientific knowledge.

S. Rep. No. 93-583, [1973] U.S. Code Cong. & Adm. News 3217, 3240.

[22]Attachment A to Plaintiffs' Mem. in Support of Summary Judgment (J.A., p. 250 in the Court of Appeals below).

[23]Complaint ¶401.

[24]Complaint ¶¶216, 219.

[25]Complaint ¶¶95, 110, 158.

[26]24 C.F.R. §1917.8.

The respondents have admitted that this procedure does not satisfy procedural due process.[27]

Moreover, the record reflects, as to the petitioner landowners, a total absence of flooding.

For example, the land of petitioner Vernon W. Frost in Fort Bend County, Texas, has not had a flood since 1913.[28] The land of petitioner, Mrs. F.B. Seerden of Montgomery County, Texas, is situated on a hill, and has not been flooded during the 70 years of Mrs. Seerden's recollection.[29]

Enforcement Under 1968 Voluntary Flood Insurance Program.

The requirements of local government participation in the Program have existed in similar form since 1968. Only since 1973, however, has the scheme of enforcing local government and landowner participation in the Program had the effect of forcing petitioners to accept irrational adjudications.

In 1968, Congress enacted a voluntary program of flood insurance, which was not then available at reasonable rates in the ordinary, private insurance market. The National Flood Insurance Program offered to interested landowners the prospect of a temporary federal subsidy of the commercial flood insurance industry. To receive insurance from private underwriters at the temporarily reduced rate, a landowner had to persuade his local community to undertake the program of zoning and building

[27]44 Fed. Reg. 6674, 6678 (item 33) (Feb. 1, 1979); this admission was brought to the attention of the Court of Appeals by supplemental memorandum prior to oral argument (Mar. 5, 1979). See also 44 Fed. Reg. 45341, 45350 (Fed. Ins. Adm. item 1) (Aug. 1, 1979).

[28]Complaint ¶226.

[29]Complaint ¶239.

code enforcement according to the technical requirements described above. Landowners who did not want insurance, or whose communities did not want to undertake the full cost of enacting and enforcing the federal flood plain standards, were free to eschew the Program without penalty.

Since it was voluntary, the 1968 Program is not challenged here.[30]

1973 Conversion of Voluntary Program to One of Federal Sanctions for Nonparticipation.

As the District Court below found, "[t]he availability of subsidized flood insurance under the National Flood Insurance Act of 1968 did not, by itself, provide sufficient incentive to attract extensive local community enrollment in the Program."[31]

Therefore, Congress in 1973 added what the District Court below found to be "a dual scheme of sanctions against both nonparticipating communities, as a whole, and against flood-prone designated property located in an area which is eligible for and participating in the Flood Insurance Program, but which is not covered by flood insurance."[32]

As presently effective, these sanctions deny to a designated landowner in a participating community any loan from any federally regulated private lending institution.[33] These landowners, and designated landowners in nonparticipating communities, [34] are also denied federal

[30]See, 453 F. Supp. at 1029 n. 11, p. 8a *infra*.

[31]453 F. Supp. at 1027, p. 5a *infra*.

[32]*Id.*

[33]42 U.S.C. §4012a(b).

[34]42 U.S.C. §4106.

disaster assistance and federally guaranteed loans such as those of the Veterans Administration and the Federal Housing Administration,[35] and each landowner must publicize to prospective purchasers that FEMA has declared his property a flood hazard.

Upon completion of the federal mapping, the federal flood insurance subsidy is curtailed. Insurance is still required to avoid the sanctions for nonparticipation in the Program. But the insurance is offered for new construction at actuarial rates without subsidy. The focus of the Program then is "through its actuarial rate provisions, to provide an incentive to private builders to avoid construction within flood hazard areas."[36]

Proceedings in the Courts Below.

The complaint was filed in November 1977. After denying preliminary injunctive relief, the District Court granted the federal respondents' cross-motion for summary judgment of dismissal. One year later, the Court of Appeals affirmed without opinion.

The District Court saw justification for the sanction of denial of loans from private lending institutions — as well as for the sanctions denying federal aid and federally insured loans — in Congress' desire "to protect the nation's investment in property that is situated in a known hazardous area . . ."[37]

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[35]It is unclear whether loan guarantees such as those of the Veterans Administration and Federal Housing Administration, to which the District Court adverted, 453 F. Supp. at 1028, p. 6a *infra*, constitute a monetary benefit or grant. See, Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224, § 3(5), 92 Stat. 4 (1978).

[36]F. Bosselman, D. Feurer and T. Richter, *Federal Land Use Regulation* 92-93 (1977).

[37]453 F. Supp. at 1038, pp. 6a-7a *infra*.

The Court found no possibility of an unreasonable[38] "taking" of any parcel in a Program which "equitably spread[s] the cost of flood disasters among those landowners who most benefit from publicly funded flood disaster relief."[39]

The District Court held that the procedure for designation of petitioners' property as floodprone — the application of the 1% rule individually to parcels — was supportable as "quasi-legislative."[40]

As to the challenge by petitioner state and local governments to their induction to enforce federal building and zoning standards, the District Court followed what it read to be the holding of *Steward Machine Co. v. Davis,* 301 U.S. 548 (1937), that a federal program found to involve the spending of federal monies could never be regulatory or coercive of the states. In such a program, state participation — as a matter of law and without inquiry into the benefits and burdens to the state — was explainable as the acceptance of a conditional federal benefit.[41]

The District Court did not distinguish between Program sanctions applied against local governments and the private loan sanctions applied against landowners to secure both landowner and local government participation. The Court found participation in the Program to be "not mandatory but. . . left in the hands of the State."[42]

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[38]See 453 F. Supp. at 1031-32, p. 14a *infra*.

[39]453 F. Supp. at 1032, p. 15a *infra*.

The Congress, on the other hand, intended flood insurance "as a substitute and eventual replacement for Federal disaster relief for flood occurrences, so that property owners. . . will be permitted to contribute to their own protection . . ." S. Rep. No. 93-583, [1973] U.S. Code Cong. & Adm. News 3217, 3233.

[40]453 F. Supp. at 1032, p. 16a *infra*.

[41]453 F. Supp. at 1030, pp. 10a-12a *infra*.

[42]453 F. Supp. at 1031, p. 12a *infra*.

REASONS FOR GRANTING THE WRIT

This case presents an unusual amalgam of the rights of landowners and of local governments against erroneous federal agency action undertaken in violation of procedural due process. The Courts below focused principally on the rights of the local governments to be free of federal interference in the exercise of their zoning power. However, the rights of the landowners are of equal importance; these rights are as applicable in the context of local government zoning adjudications, as under the adjudications in this limited initial federal foray into land use control.

The interests of the landowners and their local governments come together under the National Flood Insurance Program because the landowners (even if wrongfully adjudicated as floodprone) can escape the sanctions under the Program only if their local governments enact and enforce FEMA's zoning and building provisions. However, the most severe sanctions are applicable to nonparticipating landowners even when their local governments have agreed to participate in the Program. Some communities desire participation in the federal Program for the benefit of lands truly susceptible to flooding. These communities contain other lands not susceptible to flooding which nonetheless have been designated by FEMA as floodprone. It is no answer to the landowners' claims of erroneous designation in the latter class to say that their communities have agreed to participate in the Program. Yet, that was the basis on which the Courts below disposed of the constitutional claims of these landowners.

1. The Federal Designation of The Property of these Petitioner Landowners as Floodprone Constituted an Arbitrary Taking Without Procedural Due Process.

Throughout, the District Court below considered only the nationwide rationality of the National Flood Insurance Program.

As to the procedural due process challenge, the Court upheld the Program as "quasi-legislative."[43]

The federal selection of the 1% definition of flood proneness was a rulemaking. That rule is not challenged here.[44] The application of the rule to these petitioners' parcels by declaring them floodprone, on the other hand, is a federal adjudication to which the guarantees of due process apply.[45]

The National Flood Insurance Program procedures actually considered by the Courts below, fail the test of *Goldberg v. Kelly*, 397 U.S. 254 (1970). Designation of petitioners' property as floodprone adjudicates a substantial right, and substantially affects both landowner and government petitioners.

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[43]453 F. Supp. at 1032, p. 16a *infra*.

[44]So, the cases cited by the District Court below, 453 F. Supp. at 1031-32, p. 14 *infra* (each of which was analyzed most recently by this Court in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-28 (1978)) are inapposite, involving as they did individualized impacts of regulations conceded to encompass the challenging landowners. There were in these cases no factual disputes about the applicability of the regulation. The analogy in the flood insurance Program would be to a challenge of the sanctions by a landowner who concedes his property is floodprone. See, *Codd v. Velger*, 429 U. S. 624 (1977).

[45]See, ALI Model Land Development Code §§ 2-308(2) and note, 4-201 and 10-201(3)(e) (1975). See also, K. Davis, *Administrative Law Text* § 7.03 at 161-62 and § 7.05 at 164-65 (3d ed. 1972).

Commentators[46] have seen *Goldberg* as a promise unkept, criticizing later definitional narrowing of "property." But, this case is not one raising the question whether flood insurance is "property" which can be denied without due process. First, a wrongful adjudication of land as floodprone does not deny the landowner insurance; it requires him to spend his own money to purchase flood insurance. More importantly, the adjudication must be disclosed to all potential purchasers.[47] The property involved in this case is not federally subsidized insurance, but the petitioners' land itself.[48]

The Program procedures give FEMA the option (without limitation or guidance) to hold a hearing. Landowners are not otherwise permitted to confront the source of FEMA's hydrologic conclusions (usually a hired consultant). FEMA need not produce a record evaluating landowner challenges. The Program procedures do not produce a record susceptible of meaningful judicial review. Petitioners in this case were not afforded a hearing to challenge the adjudication of their land as flood prone.

The adjudication has made petitioners' land useless[49] and, to the extent it is not in fact a flood hazard, has done so with no counterbalancing public benefit of flood control.

Nationwide, $55 billion worth of property has been federally adjudicated as floodprone.[50]

The effect of an erroneous adjudication of these petitioners' lands as floodprone is to make impossible the sale

[46]E.G., J. Nowak, R. Rotunda and J. Young, *Constitutional Law* 479, 492-95 (1978).

[47]42 U.S.C. §4106(b).

[48]The stigma of property as floodprone involves, independently of property, the landowners' liberty interest.

[49]Cf., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978).

[50]S. Rep. No. 96-145 at 3 (1979).

of the land. And, sanctions are imposed on recalcitrant landowners whose property is so adjudicated.[51]

Careful application of the accepted jurisprudence of inverse condemnation ("taking" by regulation) to the facts of this case would support a conclusion of taking by erroneous adjudication.[52]

Flood plain zoning produces the cases in which a "taking" is most easily found. Local governments realize this and, accordingly, tailor their ordinances to definable hazards and remain ready to adapt, through the normal administrative procedures of zoning, to changed circumstances.

Perhaps the best indication that the Program has been arbitrarily applied to these landowners is the absence of any action by the landowners' local governments — apart from the enforcement of the federal Program — to apply their own zoning power to prevent flood hazards.

Were the Program seen as an exercise of a federal police power, summary reversal on fifth amendment grounds would be appropriate.

[51]Cf., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See, *Vlandis v. Kline*, 412 U.S. 441, 451 (1973).

[52]Petitioners moved for summary judgment. In accordance with Local Rule 1-9 of the District Court, a statement of material facts as to which there is no genuine issue was filed, incorporating and elaborating on all of the facts recited in this Petition. No statement of genuine issues controverting by proof any of these factual assertions was filed by respondents.

2. The Decision Below Suggests that Guarantees of the Constitution and Decisions of this Court, Mandating Substantive and Procedural Due Process, and Preserving Autonomy for State and Local Governments, Can Be Abrogated in Any Federal Spending Program.

The attention of the Courts below was directed to what might be characterized as a confession and avoidance of these fifth amendment violations in the adjudication of petitioners' lands as floodprone. Both as to the petitioner landowners and as to the petitioner state and local governments, the Courts attached dispositive weight to the beneficial nature of the National Flood Insurance Program. In the penultimate paragraph of its analysis,[53] the District Court "balanced" the value of the federal benefit involved against the procedures accorded petitioner landowners. Presumably to the Court, if the federal subsidy had been less or shorter lived, petitioners would be entitled to an expanded procedural due process; conversely, the Court presumably conceived of a point at which the federal largesse justified abrogation of procedural due process altogether.

This invocation of the federal spending (general welfare) power raises substantial and unsettled questions whether the right to due process can be compromised by the inducement of a program of benefits, and, if so, whether this Program serves as inducement or as coercion.[54]

[53]453 F. Supp. at 1032-33, p. 16a *infra*.

[54]Cf., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

a. The Most Onerous Program Sanction Is Not Even Within the Federal Spending Power.

At the threshold, however, is the Program sanction which is not even colorably within the terms of the federal spending power. The sanctions include a prohibition of loans by private lending institutions; the only connection of these institutions to the federal government is their regulation by the Federal Reserve, Federal Home Loan Bank Board and other financial regulators.

It is questionable whether the banking[55] or commerce[56] power authorizes the use of the federal regulation of banks to enforce a program of federal zoning. Moreover, the rationality of an omnibus prohibition of loans as a method of insuring wisdom in lending by federally regulated banks is suspect. No less than the real estate sales market to which the District Court below adverted, federally regulated lenders "have always been capable of calculating the flood risk into their agreed [loan] purchase price."[57]

b. The Program Sanctions Arguably Under the Federal Spending Power Cannot Be Used to Justify Violation of the Due Process Rights of Landowners.

The question which must be answered affirmatively before the judgment below can be affirmed on the merits is whether — even under the spending power — the federal government can employ the extension of a benefit to cajole or coerce the waiver of a constitutional right. The question arises in this case both as to the rights of peti-

[55]U.S. Const., Art. I, §8, cl. 5.

[56]U.S. Const., Art. I, §8, cl. 3.

[57]453 F. Supp. at 1032, p. 15a *infra*.

tioner landowners and as to the rights of petitioner state and local governments.

The Courts below held that the federal benefit in the Program extinguished petitioner landowners' "taking" and procedural due process claims. The doctrine prohibiting "unconstitutional conditions,"[58] if applied to the Program, prohibits extinguishment of the landowners' claims; moreover, the doctrine prohibits extinguishment of petitioner governments' claim to be free from federally mandated expense and usurpation of local zoning decision-making[59] on the sole ground that some federal disaster benefit is extended to the governments or their citizens.[60]

The assertion — upon which disposition of the due process claims of landowners in participating communities was based — that violations of due process can be excused by, or even balanced against, federal expenditures, should not be permitted to stand without review by this Court.

The District Court below cited no case supporting the assertion that the individual rights of landowners could be waived in this fashion.

The government grantee cases[61] essentially divide power over individuals among governments. The due process restraints on all governments remain. It would have come as a surprise to the 1947 Court to see the doctrine of *Oklahoma v. Civil Service Comm'n*[62] applied to justify, e.g., the firing of the State Highway Commissioner without notice or hearing, on the ground that he was paid under the federal spending power.

[58]*Sherbert v. Verner*, 374 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958); *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956). See, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[59]*National League of Cities v. Usery*, 426 U.S. 833 (1976).

[60]Cf., *Steward Machine Co. v. Davis*, 301 U.S. 548, 565 (summary of argument of Assistant Attorney General Jackson) and 590 (1937).

[61]See pp. 26-27 *infra*.

[62]See, 330 U.S. 127, 130-33.

c. No Decision of this Court Supports the Use of the Program Sanctions Arguably Within the Federal Spending Power to Require Local Governments to Enforce Federal Law Against These Landowners.

The federal government has no omnibus power to zone directly in flood plains. The power exercised here is not limited to the promotion of, or elimination of obstructions to, commerce and navigation. If seen as directly regulatory, the federal program is not supported under the commerce power and, in any case, would be an invalid interference with the constitutional protections of state and local governments. *National League of Cities v. Usery*, 426 U.S. 833 (1976). Specifically, a regulatory federal program of the type involved here would be invalid as a conscription of local governmental lawmaking in support of federal policies. *EPA* v. *Brown*, 431 U.S. 99, 103 (per curiam).[63]

But the District Court below, as summarily affirmed, held that the regulation under the federal flood insurance Program was not regulatory in this sense.

To the District Court, "At issue here is whether the federal sanctions against non-cooperating states may be found so severe that an otherwise optional federal benefit program may fall within the recently announced rule of *National League of Cities.*"[64] Answering in the negative, the District Court below refused "to measure the potential local benefits of flood insurance against the costs of participation to local sovereignty and pocketbooks."[65]

[63]Vacating as moot, *District of Columbia v. Train*, 172 U.S. App. D.C. 311, 521 F.2d 971 (1975).

[64]453 F. Supp. at 1029, p. 9a *infra*.

[65]453 F. Supp. at 1030, p. 10a *infra*.

This question was reserved in *National League,* 426 U.S. at 852 n. 17. The reservation of the question by this Court has been taken by lower courts to signal an abdication of review of federal grant programs for compliance with the guarantees of federalism.

d. No Decision of this Court Supports a Federal Power to Coerce Action By Local Governments By Lifting a Penalty on Private Citizens.

Even if it were possible for a local government to waive the federalism protections of the Constitution by receiving a true federal grant, the hostage-taking feature of this Program forecloses any justification on the ground of financial inducement under the spending power. On the record of this case, there is not inducement, but coercion[66] to explain local adoption of FEMA's land use measures.

The Program imposes on local governments the cost of enforcing FEMA rules, displaces these governments' decisions regarding the appropriate level of diminution of their tax base value through local regulation, and exposes these governments to landowner suits for inverse condemnation.

There is no federal grant to offset the fiscal impact of Program participation on these local governments.[67]

[66]*Steward Machine Co. v. Davis,* 301 U.S. 548 (1937) is not to the contrary. There, a private employer was subject to an admittedly valid federal tax; up to 90% of the tax was forgiven, dollar for dollar, if the state taxed the employer. The total payment by the employer was the same in either case. The participating state, moreover, received a grant from the uncredited 10% of the federal tax.

[67]Cf., *Oklahoma v. Civil Service Comm'n,* 330 U.S. 127 (1947).

A federal flood control project on the traditional model is the Flood Control Act of 1936, 33 U.S.C. §701 *et seq.* Section 701c of 33 U.S.C. conditions the federal building of flood control projects on local condemnation of lands needed for the project and local government indemnification of the United States against a judgment of tort liability. See, *R. J. Widen Co. v. United States,* 174 Ct. Cl. 1020, 357 F.2d 988 (1966).

These governments' participation is explained — on the record of this case — by the desire to avoid the imposition of Program sanctions on their landowners. That the landowners can avoid federal sanctions only by securing local legislation is a violation of the guaranty clause of the Constitution.[68]

Circumvention of the rule in *National League of Cities v. Usery,* 426 U.S. 833 (1976), has become a cottage industry within the federal establishment.

The Solicitor of Labor has proposed,[69] and the Congress has adopted,[70] the suggestion that unemployment compensation costs can be imposed on state and local governments. The federal tax power over private employers is used to force these private citizens to importune their governments to waive the statutory exemption of governments from the federal unemployment tax;[71] the local governments must tax themselves to avoid a federal tax penalty on their private employers.

The Congressional Pension Task Force [72] has proposed several ways around the limitations *National League* would seem to place on the congressional power to establish funding, vesting and other standards for local

[68]U.S. Const., Art. IV, §4.

[69]"Constitutionality of State and Local Coverage, Labor Department Opinion," Staff Data and Materials on Unemployment Compensation Amendments of 1976 (H.R. 10210), Sen. Comm. on Finance, 94th Cong., 2d Sess. 95, 106 (Comm. Print 1976).

[70]Pub. l. No. 94-566, § 115, 90 Stat. 2670, amending *inter alia* 26 U.S.C. §§ 3304(a)(6), 3309.

[71]26 U.S.C. §3306(c)(7).

[72]Pension Task Force Report on Public Employee Retirement Systems, House Comm. on Education and Labor, 95th Cong., 2d. Sess. 17-22 (Comm. Print 1978).

government pension plans. Among them is a plan, similar to that of the unemployment compensation program, of holding private individuals hostage to secure local government "acquiescence" where direct federal action against the local governments is forbidden.[73]

Commentators have read *National League* as preserving citizen choices about local government priorities and expenditures free from federal substitution.[74]. It is ironic, indeed, that in this case, not only are local choices superseded, but local landowners are held hostage – through the Program sanctions – to secure local government enactment of FEMA's zoning rules.

These questions require the attention of this Court before *Texas Landowners* ought to be cited broadly as supporting a federal regulatory power under the general welfare clause of the Constitution.[75]

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[73]"Congress could currently impute to participants in governmental plans the value of their vested and funded interests in such plans, as well as the income generated by such interests. It could then condition a deferral, deduction, or exemption to currently recognizing that income upon the satisfaction by the plan of various conditions. Such a methodology would obviously generate tremendous pressure by plan participants on public plans to comply with whatever federal conditions must be met to gain favorable tax treatment for the participants." Pension Task Force Report, *supra,* at 20.

[74]E.g., L. Tribe, *American Constitutional Law* 307-318 (1977).

[75]It is not chimerical to suggest this case as a leading one. The District Court below cited as renewed approval of the federal power to order otherwise forbidden acts by governments, the district court case of *North Carolina v. Califano,* 445 F. Supp. 532, 535 (E.D. N.C. 1977), aff'd, 435 U.S. 962 (1978). Had it arisen today, *Califano,* like this case, would have been before a single district judge whose affirmance would be subject only to the certiorari jurisdiction of this Court.

At the same time, *Califano* does not govern this case. The hospital program was a grant to governments and required only government action. No Federal adjudication was involved. There were no private "hostages." The condition in *Califano* cost nothing. The State was

CONCLUSION

This case involves landowners as victims of erroneous federal adjudications, and as "hostages" to secure legislation by their local governments. This Court should review whether the regulation of banks and the extension of federal benefits can effectively foreclose the due process guarantees surrounding adjudications and the federalism-based autonomy of local legislation.

Respectfully submitted,

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August 1979

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able to show only that it had not thought of a perfectly rational planning process before the federal government did, and that, therefore, the state would have to amend its law to facilitate the spending of federal planning grants.

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1978

No. 78-1700

The Texas Landowners Rights Association, a non-profit organization established under the law of Texas, et al.,
Appellants

v.

Civil Action No. 77-1962

Patricia Roberts Harris, as Secretary of Housing and Urban Development, et al.

No. 78-1770

The Texas Landowners Rights Association, a non-profit organization established under the laws of Texas, et al.

Pacific Legal Foundation, a non-profit, tax exempt corporation established under the laws of California,
Appellant

v.

Civil Action No. 77-1962

Patricia Roberts Harris, as Secretary of Housing and Urban Development, et al.

APPEALS FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED MAY 15, 1979

BEFORE McGOWAN and ROBB, Circuit Judges, and GESELL*,
United States District Judge for the United States
District Court for the District of Columbia

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in these causes is hereby affirmed on the basis of the Memorandum Opinion, filed June 1, 1978, of the District Court (The Honorable Joseph C. Waddy, District Judge).

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEXAS LANDOWNERS RIGHTS ASSOCIATION, ET AL., Plaintiffs,	)	
v.	)	Civil Action No. 77-1962
PATRICIA ROBERTS HARRIS, et al., Defendants.	)	

[Filed June 1, 1978]

MEMORANDUM OPINION

This action for declaratory and injunctive relief challenges the constitutionality of the National Flood Insurance Program (the "Program"), 42 U.S.C. §§ 4001-4128,[1] and the administrative regulations implementing the Program, 24 C.F.R. §§ 1909.1-1925.14. Plaintiffs are the State of Missouri, 40 political subdivisions in 12 states, and 30 individual landowners and associations of

[1]The National Flood Insurance Program is comprised of the National Flood Insurance Act of 1968; Title XIII of the HUD Act of 1968, Pub. L. No. 90-448; Title IV of the HUD Act of 1969, Pub. L. No. 91-152; the Flood Disaster Protection Act of 1973, Pub. L. No. 93-234; Section 816 of the Housing and Community Development Act of 1974, Pub. L. No. 93-383; Pub. L. No. 94-375; Title VII of Pub. L. No. 95-128; *codified at*, 42 U.S.C. §§ 4001-4128.

landowners within federally designated flood zones.[2] Defendants are the Secretary of Housing and Urban Development, who is charged with establishment and implementation of the Program, 42 U.S.C. § 4011(a), the Deputy Administrator of the Federal Insurance Administration and the Assistant Administrator for Flood Insurance. The Court has jurisdiction of this substantial federal question, without regard to the amount in controversy, pursuant to 28 U.S.C. § 1331(a).

The National Flood Insurance Program is attacked on three independent grounds: (1) The State and local governments, on their own behalf and as *parens patriae,* challenge the Program as violative of constitutional principles of federalism and state sovereignty under the Tenth Amendment. (2) Plaintiff landowners and landowner organizations contend that the Program constitutes a taking of their land without the payment of just compensation as required by the Fifth and Fourteenth Amendments. (3) All plaintiffs claim that the Program provides inadequate due process protections and that it is an irrational exercise of Congressional power under the Fifth and Fourteenth Amendments.

The Court previously heard and, ruling from the bench, denied plaintiffs' Motion for a Preliminary Injunction.[3] At the conclusion of that hearing the parties agreed that no real questions of fact were in dispute and that this action involved strictly legal propositions. Consequently, this case is now before the Court on the parties' cross-motions for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

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[2]Paragraphs 15-17 of the Complaint set forth class action allegations. However, plaintiffs have not moved for certification of the class pursuant to Rule 23 of the Federal Rules of Civil Procedure or Rule 1-13(b) of the Rules of the United States District Court for the District of Columbia.

[3]Transcript of proceedings on plaintiffs' Motion for a Preliminary Injunction, filed Jan. 19, 1978, at 49-52.

The National Flood Insurance Program

In August 1968, the National Flood Insurance Act of 1968 was enacted as Title XIII of the Housing and Urban Development Act of 1968.[4] Administered by the Department of Housing and Urban Development (HUD), the Program is a federally subsidized plan to protect property owners, and the United States, against flood damage resulting in ". . .personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation's resources. . . ." 42 U.S.C. § 4001(a) (1). As a condition of eligibility for government supported flood insurance, the 1968 Act required HUD designated flood-prone communities to adopt local flood plain management measures to reduce or avoid flood damage. 42 U.S.C. §§ 4022, 4102.

The availability of subsidized flood insurance under the National Flood Insurance Act of 1968 did not, by itself, provide sufficient incentive to attract extensive local community enrollment in the Program. *See* S. Rep. No. 93-583, 93d Cong., 1st. Sess. 4, *reprinted in [*1973*]* U.S. Code Cong. & Ad. News 3217, 3220 (Senate Report). Finding a strong public policy favoring participation in a flood insurance plan of national scope, 42 U.S.C. § 4002(a) (5), in December 1973, Congress passed the Flood Disaster Protection Act of 1973[5]. The 1973 Act sought to significantly enhance the attractiveness of enrollment in the Program through a dual scheme of sanctions against both non-participating communities, as a whole, and against flood-prone designated property located in an area which is eligible for and participating in the Flood Insurance Program, but which is not covered by flood insurance.

Section 202 of the 1973 Act, as originally enacted, denied both federal financial assistance for acquisition or

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[4]Pub. L. No. 90-448, Title XIII, 82 Stat. 476.

[5]Pub. L. No. 93-234, 87 Stat. 975.

construction purposes[6] and federally-related financing by private lending institutions[7] for use in HUD designated flood-prone localities, unless the community in which the property is situated participates in the Program. This Section was amended by Section 703 of the Housing and Community Development Act of 1977[8] to remove the prohibition against the extension of financing by federally supervised private lending institutions in flood hazard areas of non-participating communities. The amendment left untouched the direct federal assistance sanctions which extend to direct federal grant aid as well as to FHA and VA home mortgages.

Section 102 of the 1973 Act, the counterpart of Section 202 applied to property located in participating communities where flood insurance is available under the Program, denies both direct federal financial assistance[9] and federally-related financing by private lending institutions[10] for acquisition or construction purposes, unless the property is covered by flood insurance.

In sum, Congress has mandated that in order to protect the nation's investment in property that is situated in a

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[6]Section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4106(a).

[7]Section 202(b) of the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4106(b), *before amendment by* the Housing and Community Development Act of 1977, § 703, Pub. L. No. 95-128, 91 Stat. 1111.

[8]Pub. L. No. 95-128, § 703, 91 Stat. 1111 (*codified at* 42 U.S.C. § 4106(b), *as amended.*). Amended Section 202(b) is now merely a notice provision requiring lenders to inform borrowers whether or not their properties would be eligible for federal disaster relief assistance in the event of a flood. Conventional mortgage money is again available, as usual, to a community under Section 202 sanctions.

[9]Section 102(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4012a(a).

[10]Section 102(b) of the Flood Disaster Protection Act of 1973, 42 U.S.C. § 4012a(b).

known hazardous area, the community in which that property is located must participate in the Program to be eligible for federal assistance, and further, that property located in a participating community must be covered by flood insurance not only to be eligible for direct federal assistance, but also to receive mortgage money from a federally supervised private institution. *See* Senate Report at 10. Acceptance into the Program is, of course, contingent upon the community's adoption of local flood plain management efforts consistent with HUD promulgated guidelines.

Tenth Amendment Challenge

The State and local government plaintiffs claim that the National Flood Insurance Program violates their sovereign powers and the principles of federalism embodied in the Tenth Amendment to the Constitution, which declares that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Those plaintiffs specifically complain of a loss of control over the traditionally local governmental function of regulating the community's land use; the cost of administering and enforcing the federally approved zoning regulations required for acceptance into the Program; and the loss to the local tax base resulting from a decline in the community's property values when Program sanctions attach.

While they recognize that the federal government may impose various conditions and terms upon the receipt of federal benefits by the states, plaintiffs contend that in this instance Congress overstepped the Tenth Amendment limitations on its power. They argue that the National

Flood Insurance Act of 1968 presented the local governments with the usual choice between complying with the federal conditions and accepting the benefits of the Program, or not adopting the federal standards and foregoing the benefits, but that the broadened sanctions of the Flood Disaster Protection Act of 1973 changed the Program into a mandatory enactment which encroaches upon heretofore traditional areas of local sovereignty.[11]

In response to the Court's questions at the hearing, plaintiffs conceded that on its face the Program *does* appear to present a participation option.[12] However, it is urged that this apparent option is only illusory, and that the threat of Sections 102 and 202 sanctions against nonparticipants results in a Hobson's choice. Plaintiffs contend that this is not the typical symbiotic program where the localities are free to either take or leave the federal benefit. Here, they claim, the local communities lose more by not accepting the Program than they would stand to gain by complying with the national flood plain standards and purchasing federal flood insurance. Plaintiffs conclude that the effective mandatory nature of the Program contravenes the Tenth Amendment. In support of this proposition they rely primarily upon *National League of Cities* v. *Usery,* 426 U.S. 833 (1976) and *District of Columbia* v. *Train,* 521 F.2d 971 (D.C. Cir. 1975).

Defendants characterize the National Flood Insurance Program as a traditional federal benefit program. They reject plaintiffs' "host of horribles" and maintain that the Program is a constitutional exercise of the Tax and Spend, or, General Welfare Clause of the Constitution in favor of

[11]Plaintiffs do not seek to have the entire Program struck down as unconstitutional. They would like a return to the Program as it existed under the 1968 Act, before the 1973 amendments.

[12]Transcript of proceedings on cross-motions for summary judgment, filed May 31, 1978, at 6.

the welfare of the nation and its citizenry, Article I, Section 8, Clause 1. That clause provides that:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; . . .

The government defendants find *National League of Cities* and *District of Columbia* v. *Train* inapposite to this case as each of those decisions considered federal programs promulgated pursuant to the exclusive power of the Congress under Article I, Section 8, Clause 3, of the Constitution "[t]o regulate Commerce. . .. among the several States." They also suggest that *National League of Cities* is inapplicable since there the Court found a Tenth Amendment bar to *direct* federal intrusion into the States' freedom to control their governmental functions, while here there is only an indirect involvement in such activities when, and if, the States choose to partake of federal flood insurance. Defendants specifically rely upon an unpublished three-judge court decision in *North Carolina* v. *Califano,* No. 76-0049-Civ-5 (E.D.N.C., filed Sept. 22, 1977), *aff'd mem.,* 46 U.S.L.W. 3642 (U.S. April 18, 1978).

There is no question that "[t]he offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." *Oklahoma* v. *Civil Service Comm'n.,* 330 U.S. 127, 144 (1947). At issue here is whether federal sanctions against non-cooperating states may be found so severe that an otherwise optional federal benefit program may fall within the recently announced rule of *National League of Cities.*

In *National League of Cities* the Supreme Court declared that amendments to the Fair Labor Standards Act which sought to extend the Act's minimum wage and

maximum hour provisions to employees of the States and their political subdivisions exceeded Congress' Commerce Clause authority. The Court, in that 5-4 decision, was careful to point out that the challenged provisions ". . . operate to *directly displace* the States' freedom to structure integral operations in areas of traditional governmental functions. . ." 426 U.S. 833, 852. (Emphasis added.) The Opinion explains that the Act's amendment imposed certain requirements directly upon the States, as States, and that no discretion remained with the States in implementing those requirements. At 847-8

Here, both sides have joined in aptly characterizing the Program as presenting the States and their political subdivisions with "a carrot and a stick" inducement. Plaintiffs allege that the stick is especially onerous because the Program does not provide much of a benefit. They appear to invite the Court to engage in a balancing test wherein the severity of the sanctions can offset the discretion left with the States. The resulting Hobson's choice, plaintiffs argue, must be equated with a complete absence of choice.

First, the General Welfare Clause, Art. I. § 8, cl. 1, is not a limitation upon congressional power, but, rather, ". . . a grant of power, the scope of which is quite expansive. . ." *Buckley* v. *Valeo,* 424 U.S. 1, 90 (1976). "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the Nation. What is critical or urgent changes with the times." *Helvering* v. *Davis,* 301 U.S. 619, 641(1937).[13] In this connection, Congress has been particularly attentive to setting forth the forces

[13]Justice Holmes, writing for the Court in *Missouri v. Holland,* 252 U.S. 416, 433 (1920), commented that, ". . . [W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."

which, in its view, require a national plan for flood insurance. 42 U.S.C. §§ 4001, 4002. *See* Senate Report at 2 - 4 .

Second, the suggestion of testing federal coercion upon the States through a balancing process has long been rejected. *Steward Machine Co.* v. *Davis,* 301 U.S. 548 (1937) considered the validity of the tax imposed by the Social Security Act of 1935 in the face of a challenge that the tax was, *inter alia,* ". . .an unlawful invasion of the reserved powers of the states; and that the states in submitting to it have yielded to coercion and have abandoned governmental functions which they are not permitted to surrender." 301 U.S. at 578.

Justice Cardozo, writing for the Court, explained that temptation on the part of a State to comply with a condition attached to a federal benefit is not to be equated with federal coercion upon the State. To do so would ". . . plunge the law in endless difficulties." *Steward* at 589-590. The *Steward* Court declared a general rule that when a legitimately national purpose is addressed by the Congress, the inducement offered for state compliance does not exceed the tax and spend powers delegated to the national government. At 590-591.

Similarly, here plaintiffs offer the Court an opportunity to measure the potential local benefits of flood insurance against the costs of participation to local sovereignty and pocketbooks. Yet, for the courts to take it upon themselves to strike the balance and to draw the line in a choice which Congress has left for the States would be to involve the judiciary in the same dangerous weighing process that Justice Cardozo cautioned against over forty years ago.

The Court concurs with the parties that the National Flood Insurance Program is a carrot and stick scheme. Quite clearly, the, the Program is one which offers certain inducements for state participation, rather than one

which, along the lines of the Fair Labor Standards Act amendments in *National League of Cities,* mandates local compliance with a discretion-less federal enactment. Accordingly, the Court finds *National League of Cities* does not compel a determination that the Program violates the Tenth Amendment. And, in the absence of a direct intrusion upon state sovereignty, the Court will abide by the wise rule of *Steward* to leave the choice between accepting or rejecting federal benefit programs with the States.

This conclusion does not ignore our Circuit's decision in *District of Columbia* v. *Train,* 521 F.2d 971 (1975). In *Train* the Court of Appeals struck down certain Clean Air Act regulations which required *unconsenting* states to enact, administer and enforce Environmental Protection Agency programs. At the same time, however, the Court included in a footnote the following description of the manner in which the federal government usually attracts voluntary state compliance: "The federal government traditionally obtains state cooperation and participation in federal regulatory programs by offering the states a sufficiently attractive incentive *or by threatening to withdraw a federal benefit they are presently receiving.*" 521 F.2d at 993, n. 26. (Emphasis added.) This is precisely how Congress has chosen to proceed in providing national flood insurance for the general welfare of the Nation. *See Friends of the Earth* v. *Carey,* 552 F.2d 25, 36-7 (2d. Cir. 1977).

Chief Justice Marshall, describing the federal commerce power, ". . . made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes." *Wickard* v. *Filburn,* 317 U.S. 111, 120 (1942). (Citation omitted.) The judicial process provides no more of a forum for restraint on the Welfare Clause powers of Congress when, as here, the plaintiffs' attack is directed towards a statutory condition which is not mandatory but is left in the hands of the State.

Fifth and Fourteenth Amendment Claims Taking Without Compensation

The landowner and landowner organization plaintiffs contend that the National Flood Insurance Program constitutes a taking of their land without the payment of just compensation as required by the Fifth and Fourteenth Amendments to the Constitution. They argue that when Section 102 or 202 sanctions are applied against individual property owners or entire local communities, respectively, for non-participation in the Program, the value of their land is so drastically diminished that a "taking" must be found. The diminution in property value, it is alleged, flows from the unavailability of direct federal financial assistance and, under Section 102(b) of the Program, private institutional financing for the purposes of acquisition or construction in connection with uninsured property. These plaintiffs also contend that the federally mandated restrictions on their land use due to Program participation constitute a taking.

The defendants maintain that a Fifth Amendment taking may be found only when the property in question has been directly appropriated by the federal government, or when federal action wholly deprives the property of its current usage and renders it valueless. Here there has been no direct governmental appropriation, and, defendants contend, no showing that the land or property has been made worthless and useless.

HUD's Office of Flood Insurance, Federal Insurance Administration, in conformance with the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.,* has filed an Environmental Impact Statement on the Program which plaintiffs have attached as Exhibit D to their Complaint. It was considered in preparing the EIS that "[i]f a community chooses not to participate in the Program, economic development in the flood hazard area may be severely restricted." Exhibit D at 63. The Congress has

also considered the impact of its admittedly costly sanctions, but in weighing the merits of flood insurance against those costs has decided the sanctions are "eminently fair and reasonable". *See* Senate Report at 9-11, 18-20.

One test for a taking of property without due process of law is one of reasonableness. *Goldblatt* v. *Hempstead,* 369 U.S. 590 (1962). When the government acts to protect the safety and welfare of the community, generally no taking or appropriation is found. *Goldblatt* at 593. Only unreasonable measures will usually be held to constitute a taking. *Hadacheck* v. *Sebastian,* 239 U.S. 394, 398 (1915), *see Mugler* v. *Kansas,* 123 U.S. 623 (1887).

In *Hadacheck* the Court did not find a Fifth Amendment taking even though there was shown to be a 93% diminution in property value. As a matter of policy the Court has been reluctant to find governmental takings where the action challenged is shown to be related to a legitimate public interest. *See Miller* v. *Schoene,* 276 U.S. 272 (1927), *Euclid* v. *Ambler Realty,* 272 U.S. 365 (1926), *Reiman* v. *City of Little Rock,* 237 U.S. 171 (1915). In *Ambler Realty* the Court instructed that ". . .while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." 272 U.S. 365, 387.

Here, plaintiffs do not allege that their land has become useless. Presumably, the land, insured or not, may be put to some purposes, though the choices may be somewhat more limited when the property is covered by flood-plain land use restrictions. Plaintiffs do allege that the Program sanctions operate to make their land close to valueless.

The government defendants respond that land values are not being diminished, but that the true value of flood-

plain land is finally being ascertained for the first time, *i.e.,* the risks of such ownership are for the first time reflected by the market.

While the defendants' proposition carries a certain appeal, the Court cannot ignore the fact that purchasers in the realty market have always been capable of calculating the flood risk into their agreed purchase price. At least some portion of the decreased property value for flood-zone land must be attributed to unavailability of certain conventional avenues of financial assistance and mortgage money which dry up under Program sanctions.

Thus, this case turns upon the usual balancing test of social policy and public interest versus the rights of a landowner to be unencumbered in the use of his property. It is the Court's opinion that here the scales tip in favor of the public interest. The public safety, health and general welfare favor the Program. There is involved a legitimate national goal. One aspect of that goal is to equitably spread the costs of flood disasters among those landowners who most benefit from publicly funded flood disaster relief. This appears to be exactly what is happening, and, as discussed at the outset of this section, a result well within the contemplation of both the Congress and the Department of Housing and Urban Development.[14] Accordingly, the Court concludes that the Program does not constitute a taking without the payment of just compensation.

---

[14]One result of the Program, according to plaintiffs' representations at the hearing, has been that property owners who find themselves saddled with Section 202 sanctions due to their communities' non-participation in the Program have been lobbying and threatening legal action against their local officials in an effort to compel flood insurance eligibility. Therefore, it is the local citizens, rather than the federal government, who appear to be supplying at least part of the clout necessary to exact community participation, which plaintiffs claim results in an unconstitutional taking. Transcript filed Jan. 19, 1978, at 8-9; Transcript filed May 31, 1978, at 3-6.

Due Process

All plaintiffs allege that the Program provides inadequate due process protections and that it is an irrational exercise of congressional power under the Fifth and Fourteenth Amendments to the Constitution.

However, the Program appears to fit well within the quasi-legislative decision making process approved by this Circuit in *American Airlines, Inc.* v. *Civil Aeronautics Board,* 359 F.2d 624, 633 (D.C. Cir. 1966). Moreover, there is some question as to whether plaintiffs have succeeded in stating a claim for a due process deprivation of property. Once again the question revolves around the effects of Program sanctions. It must be remembered that the federal government does not hold a monopoly on home financing and mortgages. There are still private insurers and savings associations which, albeit limited in supply, may contract with plaintiffs for construction or acquisition funds in flood hazard areas. Even though the federal benefit is clearly more attractive, alternative sources of money are not completely abrogated. *Cf. United States* v. *Kras,* 409 U.S. 434, 445(1975). Thus, whatever deprivation of property may result from the Program must be considered insubstantial when balanced against the procedures provided for protecting that interest.

The Court has already considered and rejected the contention that the National Flood Insurance Program is an irrational exercise of Congress' powers. The federal legislature has been delegated the necessary power under Art. I, § 8, cl. 1, of the Constitution. The exercise of that power through this Program appears reasonable and rationally related to the legitimate national goal of protecting property owners, and the United States, against flood damage resulting in ". . .personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Na-

tion's resources. . . ." 42 U.S.C. § 4001(a) (1). Therefore, plaintiffs' due process claims under the Fifth and Fourteenth Amendments will be denied.

Conclusion

Accordingly, there being no material facts in dispute, and defendants being entitled to judgment as a matter of law, their Motion for Summary Judgment will be granted, and plaintiffs' cross-motion will be denied.

Joseph C. Waddy
United States District Judge

Date: May 31, 1978

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEXAS LANDOWNERS RIGHTS ASSOCIATION, ET AL., Plaintiffs,	)	
v.	)	Civil Action No. 77-1962
PATRICIA ROBERTS HARRIS, et al., Defendants.	)	

[Filed June 1, 1978]

ORDER

Upon consideration of the parties's Cross-Motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, the various memoranda filed in support of and in opposition to said motions, the oral argument by counsel for the parties, the Complaint, and the entire record herein, and for the reasons stated in the memorandum opinion filed by the Court this same date, the Court finds that there is no genuine issue of material fact and that defendants are entitled to judgment as a matter of law, therefore, it is by the Court this 31st day of May, 1978,

ORDERED that plaintiffs' Motion for Summary Judgment be, and the same hereby is, denied and it is further

ORDERED that defendants' Motion for Summary Judgment be, and the same hereby is, granted, and that Judgment be entered in favor of the defendants against the plaintiffs.

Joseph C. Waddy
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The TEXAS LANDOWNERS RIGHTS ASSOCIATION, a non-profit organization established under the laws of Texas, Terry Keeling, President 9219 Katy Freeway Suite 112 Houston, Texas 77024 (713) 464-2611,	)	
The City of CAPE GIRARDEAU, Missouri The Honorable Howard Tooke, Mayor Common Pleas Courthouse Cape Girardeau, Missouri 63701 (314) 334-3036,	)	
The State of MISSOURI John Ashcroft, Attorney General Jefferson City, Missouri 65101 (314) 751-3321,	)	
The PACIFIC LEGAL FOUNDATION, a non-profit, tax exempt corporation established under the laws of California, William Hugh O'Riordan 1990 M Street, N.W. Suite 550 Washington, D.C. 20036 (202) 466-2686,	)	Civ. Action No. 77-1962
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Plaintiffs,

v.

PATRICIA ROBERTS HARRIS, as Secretary of Housing and Urban Development,
451 Seventh Street, S.W.
Washington, D.C. 20410; and

J. ROBERT HUNTER, as Deputy Administrator of the Federal Insurance Administration,
451 Seventh Street, S.W.
Washington, D.C. 20410; and

RICHARD W. KRIMM, as Assistant Administrator for Flood Insurance,
451 Seventh Street, S.W.
Washington, D.C. 20410

COMPLAINT FOR INJUNCTION
AND DECLARATORY JUDGMENT

*****

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The TEXAS LANDOWNERS RIGHTS ASSOCIATION, a non-profit organization established under the laws of Texas,	)	
The City of CAPE GIRARDEAU, Missouri	)	
The State of MISSOURI,	)	
The PACIFIC LEGAL FOUNDATION, a non-profit, tax exempt corporation established under the laws of California, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. Action No. 77-1962
PATRICIA ROBERTS HARRIS, *et al.*,	)	
Defendants.	)	

Filed November 25, 1977

AMENDMENT TO COMPLAINT AND
SUBMISSION OF ADDITIONAL AFFIDAVITS

As a matter of course pursuant to Fed. R. Civ. P. 15(a) Plaintiffs amend their Complaint in the above cause by striking paragraphs 144 and 145 of the Complaint and all references to those paragraphs in the Complaint and by striking the ORANGE COUNTY WATER

CONTROL IMPROVEMENT DISTRICT NO. 3 as a Plaintiff in this action.

* * *

Respectfully submitted,

/s/ Charles S. Rhyne
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William S. Rhyne
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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEXAS LANDOWNERS RIGHTS ASSOCIATION, a non-profit organization established under the laws of Texas,	)	
CITY OF CAPE GIRARDEAU, a political subdivisionof the State of Missouri	)	
THE STATE OF MISSOURI,	)	
PACIFIC LEGAL FOUNDATION, a non-profit, tax exempt corporation established under the laws of California, *et al.*,	)	
v.	)	Civ. Action No. 77-1962
PATRICIA ROBERTS HARRIS, as Secretary of Housing and Urban Development,	)	
J. ROBERT HUNTER, as Deputy Administrator of the Federal Insurance Administration,	)	
RICHARD W. KRIMM, as Assistant Administrator for Flood Insurance,	)	
Defendants.	)	

Filed February 1, 1978

AMENDMENT TO COMPLAINT TO ADD PARTIES PLAINTIFF

Insert the following parties as Plaintiffs in the Complaint action:

The Borough of HILLSDALE, New Jersey,
Walter Whitman, Borough Attorney
25 E. Salem Street
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The LAKE TRAVIS IMPROVEMENT ASSOCIATION, a non-profit organization of landowners in Travis County, Texas,
C. Dan Larner, President
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* * *

Respectfully submitted,

/s/ Charles S. Rhyne
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William S. Rhyne
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TEXAS LANDOWNERS RIGHTS ASSOCIATION, a non-profit organization established under the laws of Texas,

CITY OF CAPE GIRARDEAU, a political subdivision of the State of Missouri,

THE STATE OF MISSOURI,

PACIFIC LEGAL FOUNDATION, a non-profit, tax exempt corporation established under the laws of California, *et al.*,

Plaintiffs,

v.

PATRICIA ROBERTS HARRIS, as Secretary of Housing and Urban Development,

J. ROBERT HUNTER, as Deputy Administrator of the Federal Insurance Administration,

RICHARD W. KRIMM, as Assistant Administrator for Flood Insurance,

Defendants.

Civ. Action
No. 77-1962

Filed February 16, 1978

ORDER

Upon consideration of Plaintiffs' Motion to Amend Complaint by Addition of Parties Plaintiff pursuant to Rule 15, Fed. R. Civ. P., and defendants having filed no objection thereto, and it appearing to the Court that good cause has been shown for amendment, it is therefore

ORDERED that Plaintiffs' Motion be and hereby is in all respects granted and Plaintiffs are granted leave to amend their original Complaint as requested.

/s/ Joseph C. Waddy
United States District Judge

Date February 15,1978